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Unintended Consequences of Marriage Penalty Relief: The Effect on the Married Couple's Choice of Filing Status

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also adjust the phase-outs, it will also increase the number of families already receiving a marriage bonus. As my research has shown, that means we are talking about White households, disproportionately upper income White households who are receiving the marriage bonus.[5] This proposal, while eliminating the marriage penalty, would assist African-American dual-earner couples by reducing their tax liability. However, it will not do anything to increase the number of African-American households receiving the marriage bonus, until African-Americans earn sufficient wages to allow for an increase in the number of African-American single-wager-earner households.

In conclusion, while it is important to eliminate the marriage penalty, it is more important, to me, for husbands and wives to make decisions about labor force participation without the influence of Federal Tax Laws. What would the average American household look like if men and women, African-Americans and Whites, all earned the same wages, would we see more women who are sole wage-earners, more stay-at-home dads? How much of what we see today is merely a societal construct reinforced by and reflected in the Internal Revenue Code? Whatever legislative solution is made to solve the marriage bonus/penalty issue, one must consider the differences in American households. Thank you.

PROF. BECK: Thank you very much, Dorothy, for a very, very interesting presentation. Your data is certainly new to me. Our next panelist is Professor Amy Christian.

UNINTENDED CONSEQUENCES OF MARRIAGE PENALTY RELIEF: THE EFFECT ON THE MARRIED COUPLE'S CHOICE OF FILING STATUS

Professor Amy C. Christian

PROF. CHRISTIAN:[***] First, I would like to thank New York

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[5] *See id.*

[***] B.S.B.A. 1988, Georgetown University; J.D. 1991, Harvard Law School. A member of both the California and District of Columbia Bars, Professor Christian has

Law School and the New York Law School Journal of Human Rights for sponsoring this symposium on the important topics of the marriage penalty, the tax treatment of child care expenses, and Social Security reform, and the effect of these three areas of Federal Tax Policy upon women. The School should be commended, in my view, for fostering discussion and for bringing increased exposure to these issues.

Senate majority leader Trent Lott recently referred to his interest in reducing the marriage penalty. He stated: "We have to do it now — my daughter's ready to get married."[6] The recent spate of attempts to enact marriage penalty relief by Senator Lott and others in the 105th Congress seems, on its face, laudable.[7] After all, why should the exchange of marriage vows have tax consequences?[8] Be that as it may, many proposals for marriage penalty relief are structured in a manner that creates unintended consequences — consequences with significant risks for the proposals' intended beneficiaries, including Senator Lott's daughter.

My focus of inquiry today will be on how marriage penalty

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practiced tax controversy and tax planning with Miller & Chevalier in Washington, D.C. While at Harvard Law School, she worked in the Volunteer Income Tax Assistance program as well as in the Poverty Law Clinic. She has published a variety of articles in the area of tax law, including articles appearing in the *University of Cincinnati Law Review*, the University of Virginia's *Journal of Law & Politics*, the *Southern California Review of Law and Women's Studies* and the *UCLA Journal of Environmental Law and Policy*. Professor Christian teaches Basic Income Taxation, International Tax, and Estate & Gift Tax at the Michigan State University, Detroit College of Law.

[6] Senator Trent Lott, Address at a U.S. Chamber of Commerce breakfast (Jan. 27, 1999), *quoted in* THE CHRISTIAN SCI. MONITOR, Feb. 2, 1999, at 11.

[7] *See, e.g.*, S. 2147, 105th Cong. § 1 (1998); H.R. 3524, 105th Cong. § 1 (1998); Half and Half: Tax Relief and Debt Reduction Act of 1998, S. 1711, 105th Cong. §§ 2-3 (1998); Middle Class Tax Relief Act of 1998, H.R. 3151, 105th Cong. § 3 (1998).

[8] *See, e.g.*, Harvey E. Brazer, *Income Tax Treatment of the Family*, *in* THE ECONOMICS OF TAXATION 223 (Henry J. Aaron & Michael J. Boskin eds., 1980) (criticizing the marriage penalty and advocating marriage neutrality); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45-57 (Karen B. Brown & Mary Louise Fellows eds., 1996) (criticizing the marriage penalty for its disparate impact on African-Americans); Douglas K. Chapman, *Marriage Neutrality: An Old Idea Comes of Age*, 87 W. VA. L. REV. 335 (1985); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 8 (1980) (arguing that total tax should not change upon marriage); Patricia Cain, *Sexual Identity in Tax & Theory*, *in* CRITICAL TAX THEORY: A WORKSHOP (Sept. 8, 1995) (questioning whether "marriage" should be treated as a tax-relevant event).

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relief proposals affect a couple's choice of filing status. That is, how do the various relief proposals affect a married couple's decision of whether to file jointly or separately? As you know, the current rate structure encourages most couples to file joint returns, rather than separate ones, by establishing a lower tax liability under the joint return.[9] Predictably, of course, most couples file jointly.[10] The question I will address, then, is how the proposals for marriage penalty relief affect this incentive. Although this question is usually overlooked in debates surrounding the marriage penalty, it is, nevertheless, an important one.[11] After all, significant legal

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[9] *See, e.g.*, Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should be Repealed*, 43 VAND. L. REV. 317, 372 (1990) (explaining that "[t]he tax system is designed almost to force married persons to file jointly, rather than separately."); Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 601-02 (1998) [hereinafter Christian, *Liability*]; Amy C. Christian, *Joint Versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources from Women to Men*, 6 S. CAL. REV. L. & WOMEN'S STUD. 443, 447-48 (1997) [hereinafter Christian, *Complicity*]; Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 269-71 (1997) [hereinafter Christian, *Rate Structure*]; Harvey S. Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 425 (1977).

[10] In 1993, an estimated 95.2% of all returns filed by married taxpayers were joint returns, and an estimated 97.5% of all married couples filed jointly. These estimates were derived from IRS statistics on the number of joint returns filed and the number of separate returns filed. In 1993, 48,298,687 returns in which spouses filed jointly were submitted to the IRS. *See* I.R.S., Pub. 1304, STATISTICS OF INCOME - 1993 INDIVIDUAL INCOME TAX RETURNS 35 tbl.1.3 (1996). Only 2,437,311 separate returns were filed by married taxpayers. *See id.* Consequently, the total number of returns filed by married taxpayers can be estimated to be 50,735,998. Of these, 48,298,687 or 95.2% were joint returns. When one spouse files separately, the other may also file separately or not at all depending on whether that other spouse has sufficient income to trigger the filing requirement. An estimate of the number of such couples would be half of the number of separate returns filed in 1993 or half of 2,437,311. This is not a precise estimate, however, because undoubtedly some spouses of separate filers did not file separately or at all on their own behalf. Nevertheless, assuming 1,218,656 couples filed separately, the total number of married couples who filed returns would amount to 49,517,343 and the percentage of couples who chose to file jointly could be estimated as 48,298,687 divided by the total number of couples who filed, or 49,517,343. In this manner, the percentage of couples who filed jointly could be estimated at 97.5%.

[11] Discussion of the marriage penalty usually focuses on other questions like the following. Should concerns for marriage neutrality outweigh the goals underlying couples neutrality or progressivity? *See, e.g.*, Boris I. Bittker, *Federal Income Taxation*

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consequences flow from the decision of whether to file jointly or separately. What are those consequences? There are many. The one I will focus on today is the sometimes severe inequity attending the rule of joint and several liability. When a married couple files jointly, it is treated as consenting, whether or not the spouses know it, to joint and several liability.[12] That is, the Internal Revenue Service can collect a tax deficiency from one spouse even if that deficiency was generated by the other spouse. A spouse can sometimes escape the pernicious effects of joint and several liability, but only if he or she qualifies for relief under the very narrowly tailored, and in many respects inadequate, "innocent spouse" rules of section 6015.[13]

Now, why is the joint and several liability that accompanies joint filing a problem? First, joint and several liability is problematic on its face because it requires one person to pay a tax generated by another.[14] In addition, as Professor Richard Beck has established, the system of joint and several liability applies more frequently and more onerously against women than it does against men.[15] Finally, joint

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and the Family, 27 STAN. L. REV. 1389, 1395-96, 1429-31 (1975). Whom does the marriage penalty tend to burden? Whom does the marriage bonus usually benefit? *See, e.g.*, Brown, *supra* note 8, at 45-57 (arguing that African Americans tend to experience a marriage penalty, while white Americans are more likely to experience a marriage bonus). Does marriage penalty relief constitute a penalty on single taxpayers? While these questions are important, the issue of how the relief proposals might affect a married couple's decision of whether to file jointly or separately is also important.

[12] *See* I.R.C. § 6013(d)(3) (1999).

[13] *See* I.R.C. § 6015 (1999). *See* Toni Robinson & Mary Ferrari, *The New Innocent Spouse Provision: 'Reason and Law Walking Hand in Hand'?*, TAX NOTES, Aug. 17, 1998, at 835-49 (discussing various ways in which the new § 6015 innocent spouse rules provide inadequate relief).

[14] *See, e.g.*, Christian, *Liability*, *supra* note 9, at 536, 592-93.

[15] *See* Beck, *supra* note 9, at 320 & n.4, 327-28 n.34 (estimating that approximately 90% of the collections from the spouse who did not generate the deficiency penalized women and that only 10% penalized men). *See also* Jerome Borison, *Alice Through a Very Dark and Confusing Looking Glass: Getting Equity from the Tax Court in Innocent Spouse Cases*, 30 FAM. L.Q. 123, 125 (1996); Christian, *Liability*, *supra* note 9, at 593-98; H.J. Cummins, *Catch 1040: Joint Returns Mean Joint Liability - And In Some Cases, That Means Trouble*, NEWSDAY, Jan. 30, 1994, *available in* 1994 WL 7442627; Stephen A. Zorn, *Innocent Spouses, Reasonable Women and Divorce: The Gap Between Reality and the Internal Revenue Code*, 3 MICH. J. GENDER & L. 421, 424-25 (1996); Lisa K. Edison-Smith, Comment, *"If You Love Me, You'll Sign My Tax Return": Spousal Joint and Several Liability for Federal Income Taxes and the*

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and several liability contributes to systemic bias in the tax code — bias which also tends to be directed against women.[16] What is an example of systemic bias? Well, under the tax code, the incentive to file jointly is strongest for couples in which spouses' incomes differ; the more they differ, the greater the incentive to use the joint return.[17] Because joint and several liability applies only when couples file jointly, and because the incentive to file jointly is strongest for couples in which spouses' incomes differ, joint and several liability is designed in such a way as to apply with the greatest frequency when one spouse, usually the husband, earns significantly more than the other, usually the wife.[18] This situation of unequal spousal resources is precisely when it is *least* fair to impose joint and several liability.[19]

In general, this significant defect or bias persists under most of the marriage penalty proposals that were before Congress during the last two years.[20] Marriage penalty relief proposals do not address the problem of joint and several liability. Indeed, most of those proposals would make the joint return even more attractive than it already is. Under those proposals, even more couples would file jointly rather than separately. Even more couples would find themselves locked into a joint return and the resulting specter of joint and several liability. The intended beneficiaries of marriage penalty relief, perhaps even Senator Lott's own daughter, may find themselves more likely to face an unintended consequence: being held liable for a spouse's tax liability.

I have analyzed the various proposals for marriage penalty relief introduced in the 105th Congress and especially their probable

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"Innocent Spouse" Exception, 18 HAMLINE L. REV. 102, 119, 123-24 (1994).

[16] *See* Christian, *Liability*, *supra* note 9, at 536-37, 598-615 (exposing three examples of systemic bias, instances in which the rule of joint and several liability interacts with other provisions of the tax code to create bias against women).

[17] *See* Christian, *Liability*, *supra* note 9, at 601-02; Christian, *Complicity*, *supra* note 9, at 447-48; Christian, *Rate Structure*, *supra* note 9, at 269-71. In general, this pattern would remain true under the congressional proposals for marriage penalty relief.

[18] *See* Christian, *Liability*, *supra* note 9, at 604-09.

[19] *See id.* at 605.

[20] *See infra* notes 21-32 and accompanying text.

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effects on a married couple's decision to file jointly or separately. While I discuss most of the proposals in an article I am preparing in conjunction with this symposium, I will analyze a few of the bills here today. Some bills would alter the Earned Income Tax Credit (EITC).[21] Of these, none changes the current requirement that to be eligible for the credit, married taxpayers must a file joint return.[22] Thus, the EITC remains a provision of the tax code that makes joint returns relatively attractive and separate returns relatively unattractive. This tipping of benefits in favor of joint returns plainly compounds the incentive for married couples to file jointly, not separately. As a result, more married couples in the lower-income tax brackets must use joint returns to get the credit and more, thus, become subject to the regime of joint and several liability.[23] With regard to proposals that attempt to offer marriage penalty relief through a deduction or credit,[24] in each case, the availability of the tax preference is

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[21] *See* H.R. 3995, 105th Cong. § 1 (1998); Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997), (Amendment No. 2686 to Amendment No. 2437 offered by Mr. Gramm on June 10, 1998).

[22] *See* I.R.C. § 32(d) (1999) ("In the case of an individual who is married (within the meaning of section 7703), this section shall apply only if a joint return is filed for the taxable year under section 6013.").

[23] *See* I.R.C. § 6013(d)(3) (1999). This problem is significantly worse than this speech suggests. Those eligible for the EITC are generally individuals who fall into the lowest marginal tax bracket. *See* I.R.C. § 32(a)(2) (limiting and phasing out the credit as income rises). Under normal circumstances, those low-bracket individuals would have *no* incentive *arising from the rate structure* to file jointly rather than separately. They would not experience the benefits of income splitting or the burden of income aggregation that exist in the joint return rates because they generally fall in the lowest tax bracket. Under normal circumstances, those individuals would be free to file separately, rather than jointly, and, thus, would be able to avoid joint and several liability altogether. The EITC, however, ensures that these low-income couples must file jointly and results not merely in a slight increase in the number of couples subject to joint and several liability, but in a large increase in the number of couples so subject.

[24] *See* S. 2147, 105th Cong. § 1 (1998) (proposing a two-earner deduction); Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997), Amendment No. 2688 to Amendment No. 2437 offered by Mr. Daschle on June 10, 1998 (proposing a deduction for two-earner married couples); Marriage Penalty Relief Act, H.R. 2593, 105th Cong. § 2 (1997) (proposing a deduction for two-earner married couples); Tax Freedom for Families Act of 1997, H.R. 1584, 105th Cong. § 202 (1997) (proposing a credit to reduce a couple's marriage penalty).

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conditioned on using a joint return.[25] The deduction or credit would not be available at all to a couple in which the spouses file separately. Consequently, these proposals directly exacerbate the incentive to file jointly rather than separately and would inevitably result in more couples filing jointly, thereby subjecting them to joint and several liability.

As most of you probably already know from the previous panel's discussion today, a primary cause of the marriage penalty is the structure of tax rates.[26] The rates for couples who file joint returns and the rates that apply to single people relate to each other so that some couples, those in which spouses' incomes are similar, experience a marriage penalty.[27] At the same time, however, other couples — those in which the spouses' incomes differ — actually get a marriage bonus.[28] Most of the proposals introduced in the 105th Congress attempt to reduce or eliminate the marriage penalty by altering the rate structure. Virtually all of the proposals of this sort adjust rates in a way that retains the incentive to file jointly. In fact, many of the proposals increase the likelihood that a couple will file jointly and be subject to joint and several liability.

One group of these proposals[29] addresses the marriage penalty by permitting married spouses to file jointly, separately, or, in effect,

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[25] *See* S. 2147, 105th Cong. § 1 (1998) (proposing new I.R.C. § 222(a): "In the case of a joint return under section 6013 for the taxable year, there shall be allowed as a deduction an amount . . ."); Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997), Amendment No. 2688 to Amendment No. 2437 offered by Mr. Daschle on June 10, 1998 (proposing new I.R.C. § 222(a): "In the case of a joint return under section 6013 for the taxable year, there shall be allowed as a deduction an amount . . ."); Marriage Penalty Relief Act, H.R. 2593, 105th Cong. § 2 (1997) (proposing new I.R.C. § 222(a): "In the case of a joint return for the taxable year, there shall be allowed as a deduction an amount . . ."); Tax Freedom for Families Act of 1997, H.R. 1584, 105th Cong. § 202 (1997) (proposing new I.R.C. § 24A(a): "In the case of a joint return for the taxable year, there shall be allowed as a credit . . .").

[26] *See, e.g.*, Christian, *Rate Structure*, *supra* note 9, at 272-73 & n.118.

[27] *See id.* at 273-76.

[28] *See id.* at 275.

[29] *See* Half and Half: Tax Relief and Debt Reduction Act of 1998, S. 1711, 105th Cong. (1998); Taxpayer Justice Act of 1997, H.R. 3059, 105th Cong. (1997); Marriage Tax Elimination Act, S. 1314, 105th Cong. (1997); Marriage Tax Elimination Act, H.R. 2456, 105th Cong. (1997); H.R. 2462, 105th Cong. (1997).

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as if the spouses were single. The husband and wife can choose whichever of these three statuses gives them the lowest tax liability. The single filing status option is achieved by offering married couples the new option of filing a combined return in which tax liability is computed, in effect, as if the two spouses were single.[30] Under each of the proposals taking this approach, the new, combined return is treated as a joint return and triggers joint and several liability.[31]

Under this group of proposals, how will couples file assuming the spouses choose the status that minimizes their combined tax liability? Disparate-income couples will continue to file the traditional joint return since, for them, the joint return rates are lower than single return rates. Once incomes converge enough to create a marriage penalty under the joint return, however, couples will switch to the new, combined return to get the benefit of the lower rates that apply to single individuals. Similar-income couples will choose the new, combined return that approximates being single, while disparate-income couples will continue to file the traditional joint return. This group of proposals eliminates the marriage penalty without eliminating marriage bonuses.

Unfortunately, however, this approach to marriage penalty relief will cause joint and several liability to apply to more couples. Disparate-income couples will continue to file the traditional joint return and be subject to joint and several liability. Under the proposed laws, similar- and equal-income couples would have an incentive to file the new, combined return as if they were single, rather than filing

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[30] In each proposal, *see supra* note 29, taxable income is allocated between the spouses in a manner that approaches their taxable incomes if they were single. Once these taxable incomes are determined for each spouse, tax liability is computed in the combined return by applying single rates to each separate taxable income, then by adding the two liabilities together.

[31] In each of the bills cited in note 29, *supra*, the following provision appears:

> (E) Treatment as a Joint Return. – Except as otherwise provided in this section or in the regulations prescribed hereunder, for purposes of this title (other than sections 1 and 63(c)) a combined return under this section shall be treated as a joint return.

Thus, for purposes of I.R.C. § 6013(d)(3), the new, combined return would be treated as a joint return and would trigger joint and several liability.

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jointly and rather than filing separately which had occasionally advantaged them before. So they would be more likely to face joint and several liability with the new, combined return, whereas if they had filed separately — as was sometimes advantageous under prior law[32] — joint and several liability would not have been triggered. Under the proposals, some couples, especially those in which spouses' earnings are close, are even more likely than under current law to choose a filing status that imposes joint and several liability.

Altering the Code to solve one problem, the marriage penalty, can have the unintended consequence of increasing the prevalence of other problems, in this case joint and several liability. The obvious solution to the problem of an increased incidence of joint and several liability is for Congress to repeal joint and several liability, *not* for it to *avoid* enacting marriage penalty relief. However, despite recent American Bar Association and American Institute of Certified Public Accountants (AICPA) recommendations to eliminate joint and several liability,[33] Congress has declined to repeal it.[34] It appears that joint and several liability will persist in the immediate future, unfortunate

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[32] *See, e.g.*, Christian, *Liability*, *supra* note 9, at 602 & n.308; Christian, *Rate Structure*, *supra* note 9, at 271-72 & nn.113-14.

[33] In February of 1995, the ABA House of Delegates adopted the following resolution:

> RESOLVED that the American Bar Association recommends to the Congress that sections 6013(d) and (e) of the Internal Revenue Code of 1986 be repealed (i) to eliminate joint and several liability of a taxpayer who has signed a joint return with his or her spouse for tax on income properly attributable to his or her spouse, (ii) to substitute separate liability for tax shown to be due on the joint return, and (iii) to repeal innocent spouse relief from liability for tax on the joint return when the liability arises from erroneous items of the taxpayer's spouse.

Domestic Relations Comm., ABA Sec. of Tax'n, *Comments on Liability of Divorced Spouses for Tax Deficiencies on Previously Filed Joint Returns*, *reprinted in* 50 TAX LAW. 395, 395 (1997).

In comments submitted to the IRS, the AICPA also recommended repealing joint and several liability, or, in the alternative, eliminating joint returns altogether. *See* Ken Rankin, *AICPA Advises IRS on Fairer Divorce Procedures*, 10 ACCT. TODAY, July 29, 1996, at 8, *available in* 1996 WL 8970070.

[34] *See* I.R.C. §§ 6013(d)(3), 6015 (1999) which retain the regime of joint and several liability.

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as that is. Given that, it is essential that Congress also consider the effects that any marriage penalty relief proposal has on the choice of filing status, and thus, on the likelihood that joint and several liability will apply. Only by this consideration can Congress also avoid the unintended consequences of worsening some aspects of the tax law while attempting to improve others. Thank you.

PROF. BECK: Thank you very much Professor Christian. You picked a subject dear to my heart. I have always thought that both forms of spousal liability are a species of marriage penalty. The *Poe v. Seaborn*[35] liability which makes wives liable for half their husband's taxes when they file separately, and the joint and several liability on the joint return both apply only to married persons. They are in and of themselves both a form of marriage penalty. It is a different penalty than the rate penalty, but the liability rules are a penalty too which is something that I am sure that we will come back to later. Our next speaker is Bill LaPiana.

MODERN COVERTURE: OLD WINE IN OLD BOTTLES

William P. LaPiana

PROF. LaPIANA:[****] Good morning. Any discussion of men, women, marriage, family and taxation is bound to be contentious

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[35] 282 U.S. 101 (1930).

[****] Professor William LaPiana is the Rita and Joseph Solomon Professor of Wills, Trusts, and Estates at New York Law School and a member of the American Law Institute. A.B., 1973, M.A., 1975, J.D., 1978, Ph.D., 1987, Harvard University. Adjunct Professor, Benjamin N. Cardozo School of Law, 1979; Associate, Davis Polk & Wardwell, 1979-83; Assistant Professor of Law, University of Pittsburgh, 1983-87. Author, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION, 1800-1920 (Oxford University Press, 1994); NEW YORK WILLS & TRUSTS (with McQuaid & Streng) (Shepard's/McGraw-Hill, 3d ed. 1990); DISCLAIMERS IN ESTATE PLANNING (with Brand) (Section of Real Property, Probate and Trust Law, ABA, 1990); *Thoughts and Lives*, 39 N.Y.L. SCH. L. REV. 607 (1994); *Just the Facts: The Field Code and the Case Method*, 36 N.Y.L. SCH. L. REV. 287 (1991); *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809 (1990).